

Progress report on Decision VII/8m concerning compliance by the Netherlands with its obligations under the Convention

The report provides information on the measures taken and the results achieved in the implementation of the recommendations of Decision VII/8m, paragraph 3, as requested in paragraph 4 of that Decision. With paragraph 3, the Meeting of the Parties "[r]ecommends that the Party concerned take the necessary legislative, regulatory and administrative measures to ensure that:

- (a) When a public authority reconsiders or updates the duration of any nuclear-related activity within the scope of article 6 of the Convention, the provisions of article 6 (2)–(9) are applied;
- (b) Public officials, including the judiciary, are under a legal and enforceable duty to ensure that documents relating to, or referring to, the imperative reasons of overriding public interest regarding a Natura 2000 site are considered to be environmental information within the meaning of article 2 (3) (b) of the Convention;"

Following these recommendations and request the following progress is reported:

A. Ad recommendation paragraph 3a

Introduction

1. The case concerns a communication submitted by Greenpeace alleging that the Netherlands, as the Party concerned, failed to provide for public participation as required by article 6 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention, hereinafter: 'the Convention') when granting the licence to extend the design lifetime ('LTO licence') of the Borssele Nuclear Power Plant ('Borssele NPP').
2. To follow up on earlier progress reports, this progress report to the Aarhus Convention Compliance Committee (hereafter 'the Committee') will state the measures taken and results achieved in implementing the recommendation paragraph 3 (a) of decision VII/8m of the Meeting of the Parties.

Overview of the measures taken

3. Pursuant to the ACCC's recommendation in its findings on communication ACCC/C/2014/104, the Government has implemented an amendment to section 17 of the Nuclear Energy Act. The amendment entails that in the future, for permits related to revision or amendment of the duration of a nuclear activity, the uniform public participatory procedure of part 3.4 of the General Administrative Law Act (dutch: *Algemene wet bestuursrecht*; *Abbrev.: Awb*) will always apply. The amendment to the Nuclear Energy Act (dutch: *Kernenergiewet*) entered into force on 10 February 2022.
4. As reported in earlier progress reports and in addition to respond to paragraph 3 (a) of decision VII/8m, the Government is intending to amend the Nuclear Facilities, Fissile Material and Ores Decree, in such a way that it will ensure that the relevant information required by article 6 (6) of the Convention is always timely available to everyone.

Outline of the steps necessary to implement the proposed measures

5. However, before the Government can amend the Nuclear Facilities, Fissile Material and Ores Decree, the Government came across a number of issues which require more reflection:
 - a. The Government submitted written questions to the Committee seeking practical guidance on the scope of article 6 of the Convention (submitted on 22 April 2022).
 - b. On 24 August 2022, the Government received the Committee's 'Draft advice by the Aarhus Convention Compliance Committee to the Netherlands concerning the implementation of paragraph 3 (a) of decision VII/8m' ('draft advice'), including an Annex to the draft advice.

- c. On 9 November 2022 the Government provided the Committee with the Government's response to the draft advice concerning the implementation of paragraph 3 (a) of decision VII/8m.
- d. At the moment the Government is waiting for further guidance from the Committee. Once the scope of article 6 of the Aarhus Convention has been clarified, the following steps are expected to be taken for the purposes of implementation:
 - Preparing a draft decree to amend the Nuclear Facilities, Fissile Material and Ores Decree and informing the ACCC.
 - Submitting the draft decree for public consultation online.
 - Prior publication of the draft decree and submission to parliament for preliminary scrutiny, under the preliminary parliamentary scrutiny procedure applicable on the basis of section 76 of the Nuclear Energy Act.
 - Requesting an advisory opinion from the Council of State (Raad van State), to be incorporated in the report; any necessary adjustments will be made to the decree and the accompanying explanatory memorandum.
 - Publication and entry into force of the decree.

Final date by when implementation of recommendation will be completed

6. As soon as possible. As stated above, on 22 April 2022 the Netherlands submitted written questions to the Committee requesting further guidance. The timing of the implementation of the amendment to the Nuclear Facilities Decree will depend on when further guidance is received. Up till now (October 2023) the Committee's response has not reached us yet.
7. On average it takes 18 months to amend a decree (in this case, the Nuclear Facilities, Fissile Material and Ores Decree).

Additional information about the ongoing application of the Aarhus Convention in the reconsideration or update of the duration of a nuclear-related activity within the scope of article 6

8. The Dutch Government intends to keep the Borssele nuclear power plant open longer as part of the transition to energy sources that do not emit greenhouse gases and achieving a fully climate-neutral energy supply. In order to facilitate the operating life extension beyond 2033, it is necessary to amend the Nuclear Energy Act, the Borssele Nuclear Power Plant Covenant (2006) and the license for the release of nuclear energy (LTO license).
9. In order to obtain a clear picture of the environmental impacts and in view of the obligations regarding (cross-border) public consultation under the Aarhus and Espoo Conventions the government has decided to complete an EIA procedure in two steps.
10. Linked to the legislative amendment, a so-called first-phase project EIA will be drawn up. Giving notice of the intention to amend the law and the draft Scoping Report are the first steps in the EIA procedure. Among other things, the draft Scoping Report sets out which alternatives will be explored in the EIA (scope) and according to which environmental aspects they will be evaluated (level of detail). The government has provided for public participation on the draft Scoping Report and the corresponding Participation Plan. Everyone, including residents outside the Netherlands, has had the opportunity to submit their views.
11. For the LTO license after 2033, it is necessary to first conduct research into whether measures are necessary, and if so which ones. The expectation is that it will not be possible to catalogue all the environmental impacts in the first phase EIA for the legislative amendment and that a second-phase project EIA will be conducted in due course, linked to the LTO license. Both EIA's (phase 1 and phase 2), the draft legislative amendment and the draft license will be open for public participation in accordance with the Aarhus Convention.

B. Ad recommendation paragraph 3b

Background of the case

1. In July 2022 the Netherlands submitted a plan of action for decision VII-8m. The plan of action explained the follow-up of the recommendation by the Committee in para 3 (b) of decision VII/8m. This recommendation has been implemented through the entry into force of the new Open Government Act (dutch: *Wet open overheid*; abbrev.: *Woo*) legislation on 1 May 2022. Additionally, the plan of action explained how case law demonstrated the necessary follow-up for the decision, and how this was complemented by the amendment of implementation instructions for the *Woo*.

Additional request for information

2. In December 2022, during the Open Session of its 77th meeting, the Committee indicated that it had concluded that the plan of action appeared to be only partially appropriate. Therefore, an additional request for information was formulated. The Netherlands provided this additional information in writing to the Committee on 7 March 2023.

3. Then, in May 2023, the Netherlands was informed through the Secretariat of the Committee of possible additional questions following the submission of the letter. A meeting with the Secretariat was held in which was explained that these questions specifically relate to the recommendation that: *'the Party concerned takes the necessary legislative, regulatory and administrative measures to ensure that public officials, including the judiciary, are under a legal and enforceable duty to ensure that documents relating to, or referring to, the imperative reasons of overriding public interest regarding a Natura 2000 site are considered to be environmental information within the meaning of article 2 (3) (b) of the Convention'*. The Secretariat clarified that this recommendation was not sufficiently addressed in the plan of action and that the Committee therefore required additional information concerning this point.

4. In this meeting, it was also confirmed by the Secretariat that the other outstanding issues of the case C124 are sufficiently resolved through the submitted plan of action. Furthermore, the Secretariat confirmed that the request for additional information only refers to the recommendation concerning documents relating to or referring imperative reasons of overriding public interest regarding a Natura 2000 site classifying as environmental information. The Committee has requested to demonstrate using legislative, regulatory or administrative measures or case law that these documents fall within the scope of environmental information.

Progress made

5. With the entry into force of the *Woo* on 1 May 2022, the definition of environmental information under the *Woo* is in accordance with article 2 (3) of the Convention, ensuring that all information that qualifies as environmental information is included in this definition. However, the definition does not explicitly include documents that relate to or refer to imperative reasons of overriding public interest regarding a Natura 2000 site. As such, there are no legislative, regulatory or administrative measures in place to ensure that documents relating to or referring to the imperative reasons of overriding public interest regarding a Natura 2000 site are considered to be environmental information. So far, there has not been any specific evidence in case law about documents relating or referring to imperative reasons of overriding public interest explicitly demonstrating this either. Nevertheless, in practice, there is no restriction imposed regarding the type of documents that are to be included.

Additional measures to be taken

6. Still, to ensure follow-up of the Committee's recommendation, amendments will be made to the implementation instructions for the *Woo*. As explained in the plan of action, these instructions were amended earlier to ensure compliance with the findings by the Committee. The instructions will be complemented with more detailed information regarding the definitions of environmental information and information relating to emissions. This information will be added to the current implementation instructions, and more specifically, the interpretation of the definition of environmental information within the meaning of article 2 (3) (b) of the Convention will be

amended to include documents relating to or referring to the imperative reasons of overriding public interest regarding a Natura 2000 site.

Timeline for implementation of the recommendation

7. The proposed amendments to the implementation instructions are being prepared this winter. As soon as they are ready for publication, the Committee will be provided with a translated version of the relevant paragraphs through the Secretariat.